August 1, 1979 the order to impose double rental from that date was correctly made.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors : *Stanley Ponniah, Ng & Soo; Gill & Tang.*

NKM PROPERTIES SDN. BHD. v. RAKYAT FIRST MERCHANT BANKERS BHD.

[F.C. (Salleh Abas C.J. (Malaya) Hashim Yeop A. Sani & Syed Agil Barakbah F.JJ.) January 12 & 18, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 163 of 1983]

Land Law – Charge – Failure to pay sum due – Order for sale – Allegation that loan not disbursed in accordance with annexure to charge – Equity – National Land Code; ss. 242 & 340.

In this case a memorandum of charge over land was executed by the appellants in favour of the respondents as security for the sum of $1.8 million with interest. Under the charge the appellants were required to pay on demand all the sums which were due and owing in accordance with the terms of the charge. The appellants received a letter of demand from the respondents but failed or neglected to pay the said sum. The respondent bank thereupon obtained an order of sale by public auction of the land. The appellants appealed. It was argued on the appeal that the loan was not disbursed in accordance with the annexure to the charge in that it was not made after the execution of the charge.

Held: in this case the charge clearly showed that disbursement of the sum of $1.8 million had in fact been made as the appellants acknowledged the receipt of the said sum in the charge. It is against all conscience and logic to allow the appellants to say that no disbursement of the loan had been made by the respondent bank under the charge and the annexure. As the loan was disbursed pursuant to the appellant's application, they cannot be heard to say that the disbursement was not in accordance with the charge.

Case referred to:

(1) *Tai Lee Finance Co. Sdn. Bhd.* v. *Official Assignee & Ors.* [1983] 1 M.L.J. 81.

FEDERAL COURT.

P.S. Ranjan for the appellants.
Saseedaran Achan for the respondents.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): By Originating Summons dated January 12, 1982 the plaintiff bank then (respondents now) obtained an order of sale by public auction of the land held under C.T. 1478 Lot Nos. 499 and 656 Mukim of Seremban charged to the bank under Negeri Sembilan Register of Charge, Presentation No. 4659-80 Volume 318 Folio 84. The background facts of the case which are not in dispute are set out in the affidavit supporting the Originating Summons. A Memorandum of Charge over the said land was executed on June 30, 1980 as security for the sum of M$1.8 million with interest thereon. The said Charge was the first charge over the land and was duly registered on July 9, 1980. By the same Charge the appellants were required to pay on demand all the sums which on their loan account was due and owing in accordance with the terms of the Charge. The appellants received the letter of demand on or about November 6, 1981 but failed or neglected to pay the said sum. The appeal is against the order of sale.

The main grounds of appeal rested on the annexure to the Charge which appears at pages 16-37 of the appeal record. This instrument was also executed on June 30, 1980 between the appellants and the respondent bank. The appellants would appear to rely heavily on clause 3.04 of the annexure relating to disbursement of the loan and clause 5.01 and clause 5.02 of the annexure relating to conditions precedent for disbursement. It was contended by the appellants that to be covered by the Charge the disbursement of the loan must on the language of clause 3.04, be made *after* the execution and presentation for registration of the Charge and upon observance and performance of clauses 5.01 and 5.02 of the annexure and not before. It is not disputed that the disbursement of the loan of M$1.8 million had been made before the execution of the Charge. The letter dated March 25, 1980 ("BCWJ-1") from the appellants to the respondent bank reads as follows:

> "We are pleased to advise that we would like to drawdown on the full amount of the Term Loan of M$1.8 million by 12.00 noon Thursday, March 27, 1980.
>
> Kindly make the necessary arrangement to release the money to Messrs Nik Hussain, Ibrahim & Abdullah, Advocates & Solicitors, for their onward transmission to our Vendor's solicitor, Messrs Thavamani & Partners.
>
> Your co-operation on this matter is greatly appreciated."

The letter dated March 28, 1980 ("BCWJ-3") from the appellants also confirmed the instruction to release the amount of the loan to the solicitors

concerned with undertaking to pay interest with effect from March 27, 1980. This letter also stated that the chargee's immediate attention would be greatly appreciated. The trial Judge found that from the terms of the letters the loan was urgently required by the chargor and was also satisfied that the amount of the loan was paid prior to and in anticipation of the execution of the Charge. The disbursement made was to enable the appellants to purchase the same land which became the subject of the Charge.

The directors of the appellants' company had also resolved that the directors be authorised to borrow the said sum of M$1.8 million on terms and conditions set out in the respondent bank's letter of offer dated February 25, 1980 ("BCWJ-4"). It was the term of the said letter of offer that the appellants were to provide the first charge of the said land as security for the loan.

On the other hand what the appellants were trying to persuade this court to hold was that the order of sale made by the trial Judge was wrong because the loan was not disbursed in accordance with the terms of the annexure to the Charge and therefore the loan was not secured by the Charge.

In our view the grounds of appeal are unconscionable and misconceived. The land C.T. 1478 Lot Nos. 499 and 656 was properly charged under the National Land Code. The Charge itself (pages 12, 13 and 14 of the appeal record) was executed in accordance with section 242 of the National Land Code by an instrument in Form 16A. The Charge expressly states that it was executed to secure the repayment to the chargee of the loan of M$1.8 million which sum was also acknowledged in the Charge itself to have been received by the appellants.

Section 340 of the National Land Code confers indefeasible title to the person or body in whose name any charge is for the time being registered and such title shall be defeasible only as provided under sub-section (2) of that section. See also *Tai Lee Finance Co. Sdn. Bhd.* v. *Official Assignee & Ors.*[1]

It would seem to us that the appellants chose to rely not on the Charge but on the annexure to the Charge which, it is true, provides as to the manner and conditions for the disbursement of the loan. In our view, however, clause 3.04 of the annexure merely imposes a duty on the bank to make the disbursement of the loan after the execution and presentation of the Charge. But this does not prevent the respondent bank from making disbursement before the execution of the Charge as done in this case with the understanding the money was urgently required for the purpose of purchasing the same land. It is to be noted also that the rate of interest payable was the same. The conditions precedent for disbursement under Article V of the annexure to the Charge would be relevant only where disbursement of the loan had not been made prior to the execution of the Charge.

In this case the Charge instrument clearly shows that disbursement of the sum of M$1.8 million had in fact been made since the appellants acknowledged the receipt of the same said sum in the Charge. It is against all conscience and logic to allow the appellants to say that no disbursement of the loan of M$1.8 million has been made by the respondent bank under the Charge and yet in the charging instrument itself the appellants acknowledged receipt of the sum. As the loan was disbursed pursuant to the appellants' application, they cannot be heard to say that the disbursement was not in accordance with the Charge.

It is our view that the arguments of the appellants are completely without merits. *Appeal dismissed with costs.*

Appeal dismissed.

Solicitors: *Ng Ek Tiong & Partners; Nik Hussain, Ibrahim & Abdullah.*

MICHAEL C. SOLLE v. UNITED MALAYAN BANKING CORPORATION

[F.C. (Salleh Abas C.J. (Malaya), Hashim Yeop A. Sani & Syed Agil Barakbah F. JJ.) January 11 & 23, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 213 of 1983]

Contract – Letter of undertaking – No breach – Bankruptcy proceedings.

In this case a consent judgement had been entered against the respondent and two others. A bankruptcy notice was caused to issue by the respondents. Subsequently the appellant managed to prevail on the bank to withdraw the bankruptcy proceeding against him upon the appellant delivering to the bank a letter of undertaking. The respondent bank later caused another bankruptcy notice to issue in another proceeding purporting to rely on the failure